

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT CHATTANOOGA**

UNITED STATES OF AMERICA)	
)	1:18-cr-11
v.)	
)	Judge Mattice/Steger
JERRY WAYNE WILKERSON,)	
MICHAEL CHATFIELD,)	
KASEY NICHOLSON,)	
BILLY HINDMON, and)	
JAYSON MONTGOMERY)	

**GOVERNMENT’S RESPONSE TO DEFENDANTS’ MOTION IN LIMINE TO
PROHIBIT THE USE OF THE WORD “KICKBACK”**

COMES NOW the United States of America by and through J. Douglas Overbey, United States Attorney for the Eastern District of Tennessee, and Perry H. Piper and Franklin P. Clark, Assistant United States Attorneys, and hereby offer this response to the motion by all defendants to prohibit the use of the word “kickback.” (R. 162, Motion.) The government has no opposition to the motion.

Background

Between 2014 and 2016, the Third Superseding Indictment¹ charges, the defendants conspired, and aided and abetted each other in substantive counts, to violate various fraud statutes, the anti-remuneration provisions of Title 42, and other crimes. (R. 131, Third Superseding Indictment). Nowhere in the Indictment is the word “kickback” used. The defendants note that the government did not use the word in the Second Superseding Indictment. As far as counsel for the government can discern, “kickback” has not appeared in any pleadings or documents filed by the government. The government has asked its agents not to use the word kickback at trial.

¹ Hereinafter, “Indictment” refers to the Third Superseding Indictment. If this response references another indictment, such reference will be clearly noted.

However, the use of the word is commonplace among those who routinely traffic in the health care fraud realm: investigators, prosecutors, criminal defense lawyers and civil lawyers. In fact, the statute specifically refers to “kickback”: “(b) Illegal remunerations (1) Whoever knowingly and willfully solicits or receives any remuneration (including any *kickback*, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind . . .” Title 42, United States Code, Section 1320a-7b(b) (emphasis added). As noted above, the statute also uses the word “bribe.” *Id.* *Bribe* seems to be a harsher word than *kickback*.

Law and Argument

Many issues arise at trial. Even though counsel has asked the agents to avoid the word, “kickback” is part of the lexicon for them. Indeed, the defendants themselves have used “kickback” in other filings in this case. (*See, e.g.*, R. 175, Motion to Dismiss, PageID# 858-59, 861-63, 865.)

While the government will try to avoid the use of kickback, the government does not agree that the usage of the word is so prejudicial that it will render a trial unfair, nor is it an example of the government opining on the credibility or character of any defendant. (R. 162, Motion at PageID# 777-78.) When the Court reads the statute to the jury during the charge, the Court will undoubtedly use the word. Numerous courts, both trial and appellate, use the word “kickback” and frequently refer to the “AKS,” or the Anti-Kickback Statute. *See, e.g., United States ex rel. Petkovic v. Foundations Health Sols., Inc.*, No. 5:10-CV-2846, 2019 WL 251556, at *4 (N.D. Ohio Jan. 17, 2019) (referring to the statute as the Anti-Kickback Statute or “AKS”).

Moreover, the defendants are charged with numerous counts of fraud and some counts of money laundering, and defendant Chatfield is charged with four counts of aggravated identity theft. “Kickback” does not seem to be of a different kind, or degree, regarding the other language

used in the indictment (and the language used in the various statutes). The government will attempt to avoid the use of “kickback” during the trial and closing argument, but the government does not agree that “kickback” is unfairly prejudicial. Accordingly, any use of it should not be grounds for a mistrial.

Conclusion

The government has instructed its agents to attempt to avoid use of the word “kickback.” The government will also attempt to use other words to describe the illegal remuneration referenced in the indictment.

Respectfully submitted,

J. DOUGLAS OVERBEY
United States Attorney

By: s/Perry H. Piper
PERRY H. PIPER, BPR # 013384
Assistant U.S. Attorney
1110 Market Street, Suite 515
Chattanooga, Tennessee 37402
(423) 752-5140
Perry.Piper@usdoj.gov

s/Franklin P. Clark
FRANKLIN P. CLARK
Assistant U.S. Attorney
1110 Market Street, Suite 515
Chattanooga, Tennessee 37402
(423) 752-5140
Frank.Clark@usdoj.gov